

LIM JOO THONG

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v.

KOPERASI SERBAGUNA TAIPING BARAT BHD

COURT OF APPEAL, KUALA LUMPUR

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SITI NORMA YAAKOB JCA

MAHADEV SHANKAR JCA

DENIS ONG JCA

[CIVIL APPEAL NO: A-02-146-96]

20 NOVEMBER 1997

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CIVIL PROCEDURE: *Appeal - Stay of execution - Auction - Whether respondent's unheard counterclaim relevant for stay of execution - Whether special circumstances required for stay of execution - Whether necessary and relevant to consider reasons why counterclaim not arbitrated - Rules of the High Court 1980, O. 47 r. 1(1)(a)*

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CIVIL PROCEDURE: *Execution - Stay - Auction - Whether undertaking by respondent sufficient ground to grant postponement of auction - Rules of High Court 1980, O. 47 r. 7(c)*

The appellant commenced an action against the respondent, in respect of a building contract, in the High Court in Ipoh. The respondent counterclaimed, but the appellant obtained a stay of proceedings, pending arbitration under s. 6 of the Arbitration Act 1952 ('Act 93') and pursuant to the provisions of cl. 34 of the building contract. An award was granted to the appellant and an order to enter judgment in terms of the award was subsequently given, under s. 27 of Act 93. The appellant had also obtained a prohibitory order to seize certain lands of the respondent in execution of the judgment entered in the arbitration award. The respondent then applied for and was granted a postponement of the public auction until its counterclaim was decided. Against that decision the appellant appealed.

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It was argued by the respondent that its counterclaim was alive and active and thus constituted the 'special circumstances' for stay of auction pursuant to O. 47 r. 1(1)(a) of the Rules of the High Court 1980 ('RHC'). The appellant submitted that the mere fact the respondent's counterclaim was unheard was not enough to establish 'special circumstances' and that in considering whether a stay should be granted, account should be taken of the refusal, neglect and conduct of the respondent to attend the arbitration hearing.

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- a* The issues thus before the court were: (i) whether the fact that the respondent's counterclaim was not arbitrated was sufficient by itself to constitute 'special circumstances'; (ii) whether the Order of 6 August 1992 applied only to the appellant's original action, or whether it applied to both the original action and counterclaim; and (iii) whether a general undertaking by respondent was sufficient ground to grant a postponement of the auction.
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Held:**Per Denis Ong JCA**

- c* [1] The fact that the respondent's counterclaim was not arbitrated or litigated was a relevant consideration. By itself however, it was insufficient to constitute special circumstances within the meaning of O. 47 r. 1(1)(a) of the Rules of the High Court 1980 ('RHC').
- d* [2] The wording of the operative part of the Order dated 6 August 1992 was clear and unambiguous. It spoke of 'prosiding prosiding' in the National Language meaning proceeding by original action and proceeding by counterclaim, that was to say, both proceedings were stayed and required by that order to be referred to arbitration. If it was intended to exclude the counterclaim from arbitration, the operative part of that order would have said so expressly or would have been restricted specifically to proceeding by original action. That order was one entire order made under s. 6 of Act 93 which stayed both the original action and the counterclaim and required both to be referred to arbitration. The sole basis for the stay of both the original action and the counterclaim was the reference of both proceedings to arbitration. The order should therefore be discharged as a whole.
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- g* [3] The court was satisfied that from the start, the respondent had failed to attend by its own representative or its solicitor the preliminary hearing fixed by the arbitrator, despite having been duly notified. It had failed to pay the arbitration deposit and it did not file its defence or counterclaim or its bundle of documents with the arbitrator. It did not attend the arbitration proceeding and these contributed to the circumstances which explained why the counterclaim was not arbitrated. There was no initiative taken by the respondent to submit its counterclaim at any time and therefore there was no counterclaim formally before the arbitrator.
- h* Accordingly, the arbitrator made no direction on it. Thus there were no special circumstances which rendered it inexpedient to enforce the judgment dated 3 June 1994 or the prohibitory order dated 22 August 1994.
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[4] There was no definite proposal by the respondent to raise enough money to discharge the balance of the judgment debt plus interest thereon which continued to accrue, to satisfy the requirement of O. 47 r. 7(c) of the RHC. Although there was a general undertaking, it was insufficient to fulfill the requirement of O. 47 r. 7(c) of the RHC and so the second auction of the land attached under the prohibitory order would be allowed to proceed.

[Appeal allowed.]

[Bahasa Malaysia Translation of Headnotes]

Perayu telah memulakan satu tindakan terhadap responden, berhubung dengan kontrak binaan, dalam Mahkamah Tinggi di Ipoh. Responden telah menuntut balas, tetapi perayu telah mendapatkan penggantungan prosiding, sementara menantikan timbangtara di bawah s. 6 Akta Timbangtara 1952 ('Akta 93') dan selaras dengan peruntukan-peruntukan fasal 34 kontrak binaan tersebut. Satu award telah diberikan kepada perayu dan satu perintah untuk memasukkan penghakiman seperti yang dipohon bagi award tersebut telah kemudiannya diberikan, di bawah s. 27 Akta 93. Perayu telah juga mendapatkan perintah larangan untuk merampas beberapa buah tanah responden dalam melaksanakan penghakiman yang dimasukkan dalam award timbangtara tersebut. Responden kemudiannya telah memohon untuk dan telah diberikan penangguhan bagi perlelongan awam sehingga tuntutan balasnya diputuskan. Perayu telah merayu terhadap keputusan itu.

Adalah diujahkan oleh responden bahawa tuntutan balasnya bersifat aktif dan wujud dan dengan itu membentuk "special circumstances" untuk mendapatkan penggantungan perlelongan selaras dengan A. 47 k. (1)(a) Kaedah-kaedah Mahkamah Tinggi 1980 ('RHC'). Perayu berhujah hakikat bahawa tuntutan balas responden telah tidak didengar tidak memadai untuk menentukan "special circumstances" dan bahawa dalam mempertimbangkan samada satu penggantungan seharusnya diberikan, pertimbangan seharusnya diambil kira mengenai keengganan, pengabaian dan perlakuan responden untuk menghadiri perbicaraan timbangtara tersebut.

Dengan itu isu-isu di hadapan mahkamah adalah (i) samada hakikat bahawa tuntutan balas responden telah tidak ditimbangtara adalah dengan sendirinya mencukupi untuk membentuk "special circumstances"; (ii) samada perintah bertarikh 6 Ogos 1992 terpakai hanya kepada tindakan asal perayu, atau samada ianya terpakai kepada kedua-duanya tindakan asal dan tuntutan balas; dan (iii) samada akujanji umum oleh responden adalah alasan yang mencukupi untuk memberikan satu penangguhan akan perlelongan itu.

**a Diputuskan:
 Oleh Denis Ong HMR**

- b [1]** Hakikat bahawa tuntutan balas responden telah tidak ditimbangtara atau dilitigasikan adalah pertimbangan yang relevan. Namun begitu secara sendirinya, ianya tidak mencukupi untuk membentuk keadaan-keadaan khas dalam maksud A. 47 k. 1(1)(a) Kaedah-kaedah Mahkamah Tinggi 1980 ('RHC').
- c [2]** Perkataan bahagian perintah bertarikh 6 Ogos 1992 yang beroperasi adalah jelas dan nyata. Ianya menyebut mengenai prosiding-prosiding dalam Bahasa Kebangsaan yang bermaksud prosiding melalui tindakan asal dan prosiding melalui tuntutan balas, iaitu, kedua-dua prosiding telah digantung dan dikehendaki oleh perintah itu untuk dirujuk kepada timbangtara. Jika ianya bertujuan untuk mengeluarkan tuntutan balas daripada timbangtara, bahagian perintah itu yang beroperasi tentunya telah menyatakan sedemikian dengan nyatanya dan akan terhad khususnya kepada prosiding melalui tindakan asal. Satunya-satunya asas untuk penggantung kedua-dua tindakan asal dan tuntutan balas adalah rujukan kedua-dua prosiding kepada timbangtara. Perintah tersebut dengan itu haruslah dilepaskan secara menyeluruh.
- e [3]** Mahkamah berpuashati bahawa dari mula lagi, responden telah gagal untuk hadir sendiri, melalui wakilnya atau peguamcaranya di perbicaraan awal yang telah ditetapkan oleh penimbangtara, walaupun telah diberitahu. Ianya telah gagal membayar deposit timbangtara dan ianya tidak memfailkan pembelaannya atau tuntutan balas atau ikatan dokumen-dokumennya dengan penimbangtara. Ianya tidak menghadiri prosiding timbangtara dan hal ini menyumbang kepada keadaan-keadaan tersebut yang mana memperjelaskan mengapa tuntutan balas itu telah tidak ditimbangtara. Tidak ada inisiatif yang telah dilakukan oleh responden untuk mengemukakan tuntutan balasnya pada bila-bila masa dan dengan itu tidak terdapat tuntutan balas secara rasmi di hadapan penimbangtara. Berikutan itu, penimbangtara tidak membuat apa-apa arahan mengenainya. Dengan itu tidak terdapat keadaan-keadaan khas yang menjadikannya tidak wajar untuk menguatkuasakan penghakiman bertarikh 3 Jun 1994 atau perintah larangan bertarikh 22 Ogos 1994.
- g [4]** Tidak terdapat cadangan tertentu oleh responden untuk mendapatkan wang yang cukup bagi melupuskan baki hutang penghakiman termasuk faedah ke atasnya yang mana terus terakru, bagi memenuhi kehendak A. 47 k. 7(c) KMT. Walaupun terdapatnya akujanji umum, ianya tidak memadai
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untuk memenuhi kehendak A. 47 r. 7(c) KMT dan dengan yang demikian perlelongan kedua tanah yang ditahan di bawah perintah larangan akan dibenarkan untuk diteruskan. a

[Rayuan dibenarkan.]

Cases referred to: b

Ferdinand Wagner v. Laubscher [1970] 2 WLR 1019 (*fol*)

Moore v. Povey [1939-40] 56 TLR 564 (*cit*)

Schofield v. Church Army [1986] 1 WLR 1328 (*fol*)

Legislation referred to:

Arbitration Act 1952, ss. 6, 27 c

Rules of the High Court 1980, O. 14 r. 3(2), O. 47 rr. 1(1)(a), 7(c)

Rules of the Supreme Court [UK], O. 14 r. 3(2)

[Appeal from High Court Malaya, Taiping; SP No: 24-262-1993(T)]

For the appellant - Faizul Hilmy Ahmad Zamri; M/s WY Chan & Roy d

For the respondent - Gurbachan Singh; M/s Bachan & Kartar

Reported by Michele Saw

JUDGMENT

Denis Ong JCA: e

The respondent (KSTBB) who was the defendant and the appellant (LJT) who was the plaintiff in the court below entered into two contracts in writing dated 21 October 1982 and 29 February 1984 for the construction and completion of infrastructure works and 177 units of single storey bungalow at Taman Long Jaafar, Jalan Raja Sulong, Kampong Boyan, Taiping, Perak. Although the infrastructure works constructed were for the 177 units of bungalows, the two contracts were separate and distinct. In terms of costs, administration and performance, they were unrelated and independent of each other. In this appeal we were concerned solely with the building contract for the 177 units. The contract sum for the 177 units was RM8,825,060.70 and the date of completion was stipulated to be 28 February 1986. As a result of an omission of three units to be constructed on Lots 8121, 8122 and 8130 (valued in aggregate at RM149,577.30) to make way for road deviation, the total number of units actually completed was 174 and the contract sum of RM8,825,060.70 originally stipulated was revised to RM8,675,483.40. Owing to financial difficulties experienced by KSTBB, progress payments and construction works were delayed and the date of completion was extended to 30 June 1989 initially and then to 19 December 1990. Clause 34 of the building contract provided for arbitration by a single arbitrator in the event of any dispute or difference f
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- a* arising under or in connection with the building contract. However, on 5 February 1991 LJT commenced G.S. No: 22-23-91 in the Ipoh High Court claiming RM1,600,558.37 against KSTBB for work done under the building contract and for interest thereon. Learned counsel for LJT confirmed at the hearing of this appeal that the statement of claim in G.S. No: 22-23-91 did
- b* not form part of the Appeal Record. On 21 August 1991, KSTBB filed a defence and counterclaim for an aggregate amount of RM1,660,042.30 and for interest thereon. On 6 August 1992, on the application of LJT made under s. 6 of the Arbitration Act 1952 (Act 93), the Ipoh High Court judge after hearing both sides ordered a stay of proceedings in G.S. No: 22-23-91 pending
- c* arbitration. On 18 February 1993, Mr. W.Y. Chin was appointed arbitrator by the President Pertubuhan Akitek Malaysia (PAM) pursuant to the provisions of cl. 34 of the building contract. On 23 June 1993, LJT filed his statement of claim and bundles of documents and on 11 August 1993 and 12 August 1993, hearing on arbitration proceeded in the absence of KSTBB although duly
- d* notified and after two postponements. On 28 October 1993, the arbitrator awarded in favour of LJT against KSTBB a sum of RM2,372,256.45 under the building contract to be paid within 21 days from 28 October 1993 in default whereof interest thereon at the rate of 8% p.a. until final settlement and costs of arbitration fixed at RM21,252.20 inclusive of arbitrator's fees, expenses, disbursements and PAM's charges.
- e* On 3 June 1994, on the application of LJT dated 27 November 1993 made under s. 27 of Act 93 by S.P. No: 24-262-93(T), Abdul Malik bin Hj. Ishak JC High Court Taiping after hearing both sides ordered leave to LJT to enforce the arbitration award dated 28 October 1993 in the same manner as a judgment
- f* or order of the High Court to the same effect and to enter judgment in terms of such award with costs. The judgment of Abdul Malik bin Hj. Ishak JC was reported in [1994] 3 CLJ 341. On 8 June 1994 KSTBB filed a notice of appeal to the Federal Court against the order dated 3 June 1994 of the learned Judicial Commissioner. It was entered as Mahkamah Agung Rayuan Sivil No: 02-330-1994. On 8 November 1994 KSTBB filed in the Federal Court a notice of
- g* motion for time to be extended up to 22 July 1994 to file the Appeal Record and for a stay of execution of the said judgment dated 3 June 1994. The motion was fixed for hearing on 26 June 1995 in the Federal Court. On 22 August 1994, LJT obtained a prohibitory order to seize certain lands of KSTBB in execution of the judgment entered in the arbitration award. On 5 December
- h* 1994 Zulkefli bin Ahmad Makinudin JC High Court Taiping ordered a stay of execution of the said prohibitory order until the disposal of KSTBB's appeal in Mahkamah Agung Rayuan Sivil No: 02-330-1994. Against that order, LJT filed a notice of appeal dated 21 December 1994 to the Court of Appeal and his appeal was entered as Mahkamah Rayuan Rayuan Sibil No: A-02-352-94.
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On 26 June 1995, the Federal Court dismissed the motion and the appeal in Mahkamah Agung Rayuan Sibil No: 02-330-1994 with costs. On 9 December 1995 LJT wholly discontinued his appeal in Mahkamah Rayuan-Rayuan Sibil No: 02-352-94 by filing a notice of discontinuance dated 4 December 1995. a

By an *ex parte* summons in chambers dated 13 December 1995 supported by an affidavit of Wan Ahmad bin Sharif affirmed on 12 December 1995, KSTBB applied for a postponement of the public auction fixed for 18 December 1995 until after (a) the instant application was heard and (b) until the counterclaim of KSTBB in G.S. No: 22-23-91 had been determined. The summons was first heard *ex parte* on 18 December 1995 and the learned Judicial Commissioner ordered in terms of relief (a) and directed that the summons be heard *inter partes* on 8 January 1996 in respect of relief (b). It was actually heard on 2 February 1996 and on 16 February 1996 Zulkefli b. Ahmad Makinudin J gave an oral decision that the public auction fixed for 18 December 1995 be postponed until the counterclaim of KSTBB was decided. Against that decision, LJT appealed to this court. So much for the facts. b
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We heard this appeal on 27 March 1997 and on the same day made known our decision orally that we allowed the appeal with costs here and below and directed that the deposit be refunded to LJT.

The main relief asked for in the said summons was clearly relief (b) that was to say, an order that the public auction fixed for 18 December 1995 be postponed until KSTBB's counterclaim was decided. Relief (a) asked for in the said summons was purely ancillary. The grounds of application were stated in paras. 10, 11, 12, 13, 14 and 14(a) of the affidavit of Wan Ahmad bin Sharif, the Honorary Secretary of KSTBB, affirmed on 12 December 1995 in support of the said summons. Briefly, they were that (1) KSTBB had a good defence which ought to be tried and without a trial the judgment in default handed down to KSTBB was unfair, (2) that KSTBB had a counterclaim against LJT which was not adjudicated upon by the arbitrator and which was still pending trial; (3) KSTBB's absence from the arbitration proceedings was unintentional, its counsel having gone overseas and KSTBB was not informed of what should be done; (4) that the lands to be auctioned exceeded RM1 million in value which was more than the reserve price fixed at RM825,250 and (5) that KSTBB undertook to abide by all orders to be made by the court if subsequently, such court was of the view that LJT suffered any loss which KSTBB should pay. e
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In his judgment, the learned judge dealt only with ground (2). According to him at p. 24 of the Appeal Record, the issue that must be decided was whether the counterclaim of KSTBB had been heard by the arbitrator. On the affidavit evidence of both sides, he found as facts that the counterclaim had not been i

- a* heard and had not been decided by the arbitrator and further, that the counterclaim in G.S. No. 22-23-91 was still alive and active and in his view the latter fact constituted “special circumstances” for him to postpone the public auction fixed for 18 December 1995. He reasoned that if the public auction was not postponed and if subsequently KSTBB should succeed in its counterclaim, it would lose its lands and would not be able to recover them.
- b* In that event, it would be an injustice to KSTBB. The learned judge stated expressly that in arriving at his decision, he did not consider the neglect of KSTBB’s solicitor in not appearing to conduct KSTBB’s case before the arbitrator.
- c* In his outline of submission tendered to this court, Mr. Faizul Hilmy learned counsel for LJT formulated the issue in this appeal thus: whether the counterclaim of KSTBB (unheard or yet to be heard) could be regarded as a special circumstance for the court (ie, the Taiping High Court) to grant an order of stay of execution of the judgment without taking into account the facts as to why the said counterclaim was unheard or yet to be heard.
- d* In his outline of submission tendered to this court, Mr. Gurbachan Singh learned counsel for KSTBB formulated the issue in this appeal thus: whether the counterclaim of KSTBB which was yet to be disposed off constituted a special circumstance for stay of auction order pending the disposal of the said counterclaim.
- e* It was obvious that both sides relied on O. 47 r. 1(1)(a) of the RHC 1980 although neither adverted to it expressly here or below. It was a fact that, as at 18 December 1995 the date fixed for the second public auction, the counterclaim of KSTBB was not heard in the sense that it was not arbitrated or litigated. The overall question then was whether that fact *per se*, without more, was sufficient to constitute special circumstances which rendered it inexpedient to enforce the judgment dated 3 June 1994 or the prohibitory order dated 22 August 1994 in the context of O. 47 r. 1(1)(a).
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- g* In substance, Mr. Faizul argued that both the original action and the counterclaim in G.S. No: 22-23-91 were stayed and referred to arbitration by the Ipoh High Court order dated 6 August 1992. LJT’s claim was in fact referred to arbitration and was arbitrated but not KSTBB’s counterclaim. The mere fact that KSTBB’s counterclaim was not arbitrated was not enough to establish special circumstances. KSTBB must show why its counterclaim was not arbitrated. In this regard, KSTBB was given every opportunity to participate in the arbitration but it did nothing. KSTBB’s predicament was entirely its own making. In considering whether a stay should be granted, the court below should have taken into account the refusal, neglect and conduct of KSTBB which it did not.
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Mr. Gurbachan said that Mr. Faizul's argument was misconceived and irrelevant. The fact was that KSTBB's counterclaim in G.S. No: 22-23-91 was still pending trial. He argued that the only reason why KSTBB's counterclaim was not arbitrated was because the order dated 6 August 1992 did not refer such counterclaim to arbitration. That order applied only to LJT's original action because LJT applied for its stay and arbitration. There was no mention of KSTBB's counterclaim in that order and neither LJT nor KSTBB referred such counterclaim to be arbitrated. In this respect, we noted that Mr. Gurbachan's argument before us did not coincide with Mr. Su's argument before the judge below who argued that KSTBB's counterclaim was not arbitrated because KSTBB did not file its counterclaim with the arbitrator. Mr. Su did not dispute that the order dated 6 August 1992 referred LJT's claim in the original action and KSTBB's counterclaim to arbitration. He said that the reason why KSTBB's counterclaim was not filed or arbitrated was because there was nothing in the order requiring LJT's claim and KSTBB's counterclaim to be heard at the same time. Thus although LJT's claim was arbitrated it was open to KSTBB to refer its counterclaim at any time before another arbitrator. To my mind, clearly there was a significant shifting of ground from one that did refer the counterclaim to arbitration to one that did not *vis-a-vis* that order. The judge below accepted Mr. Su's argument and on that basis decided that there were special circumstances in the fact that KSTBB's counterclaim was not arbitrated.

The first point raised by Mr Faizul was whether the mere fact that KSTBB's counterclaim was not arbitrated was sufficient by itself to constitute special circumstances within the meaning of O. 47 r. 1(1)(a). Neither side cited any case law authority in point. We were not aware of any local decision on the matter. However, a similar issue arose in England in *Ferdinand Wagner v. Laubscher* [1970] 2 WLR 1019 and the Court of Appeal (per Lord Denning MR at p. 1022 E) held that that fact alone without more, was no special reason within the meaning of the English RSC O. 47 r. 1(1) which corresponded to our O. 47 r. 1(1)(a). *Wagner's* case was considered in *Schofield v. Church Army* [1986] 1 WLR 1328 (CA) where at p. 1336A-E Dhillon LJ held that an applicant had to show something more than that which was required to stay execution of a summary judgment under the English RSC O. 14 r. 3(2) which corresponded to O. 14 r. 3(2) of our RHC 1980 and that something more in that case lay in the circumstances why the claims in the High Court action there had not so far been litigated. Adopting the same tests laid down in *Wagner's* case and *Schofield's* case to the present case under appeal we hold that the mere fact that KSTBB's counterclaim in G.S. No: 22-23-91 was not arbitrated or litigated was a relevant consideration. By itself however, it was insufficient to constitute "special circumstances" within the meaning of O. 47 r. 1(1)(a).

- a* The second point, raised by Mr. Gurbachan, was whether the Ipoh High Court order dated 6 August 1992 applied to LJT's original action and KSTBB's counterclaim in G.S. No: 22-23-91 as Mr. Faizul contended or to LJT's original action but not to KSTBB's counterclaim as Mr. Gurbachan contended. The dispute here concerned the scope of that order. If KSTBB disputed or
- b* was dissatisfied with that order, as Mr. Gurbachan's argument seemed to suggest, it was open to KSTBB to appeal against it to the then Supreme Court way back in 1992. Since there was no such appeal, that order was final and binding on the parties and beyond dispute now. We noted that it was recorded in the judgment at p. 18 of the Appeal Record that Mr. Faizul represented
- c* that both proceedings by original action and by counterclaim in G.S. No: 22-23-91 in the Ipoh High Court were stayed by mutual consent of the parties for the claim and counterclaim to be referred to the arbitrator for determination. We also noted that there was no record in that judgment of any protest or denial by Mr. Su of Mr. Faizul's representation. In the circumstance, it must be regarded that Mr. Faizul's representation was true.
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- To us, the wording of the operative part of the order dated 6 August 1992 at p. 28 of the Appeal Record was clear and unambiguous. It spoke of "prosiding prosiding" in the National Language meaning proceeding by original action and proceeding by counterclaim, that was to say, both proceedings were stayed
- e* and required by that order to be referred to arbitration. There could be no two views about it. If it was intended to exclude the counterclaim from arbitration, the operative part of that order would have said so expressly or would have been restricted specifically to proceeding by original action. In this connection, we also looked at the points raised in the defence and
- f* counterclaim at p. 403 of the Appeal Record and to our mind they fell squarely within the arbitration agreement cl. 34, having arisen out of or in connection with the building contract solely and there was no good reason why those points should not be referred to arbitration together with the points of claim at p. 31 of the Appeal Record before a single arbitrator. That order was one entire order made under s. 6 of Act 93 which stayed both the original action
- g* and the counterclaim and required both to be referred to arbitration. It was not open to KSTBB to pick that part of the order which ordered a stay of the counterclaim that suited it and to reject that part of the order which ordered such counterclaim to be referred to arbitration: see *Moore v. Povey* [1939-40] 56 TLR 564 (CA). The sole basis for the stay of both the original action and
- h* the counterclaim in G.S. No: 22-23-91 was the reference of both proceedings to arbitration. The order must therefore be discharged as a whole. It made little or no sense to us to order a stay of both the original action and the counterclaim and to order only the original action for arbitration. In the
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premises, we found no merit in the argument of Mr. Gurbachan and thus no basis or reason for saying that KSTBB's counterclaim was not heard because the order dated 6 August 1992 did not refer such counterclaim to arbitration.

In the light of the stand we took of the order dated 6 August 1992, why then was KSTBB's counterclaim not arbitrated? Wan Ahmad bin Sharif in his affidavit affirmed on 12 December 1995 in support of KSTBB's *ex parte* summons in chambers dated 13 December 1995 deposed that KSTBB was not given the opportunity to put forward its case before the arbitrator because its solicitor was absent on the day of the hearing and KSTBB as a lay person was not knowledgeable of the legal ways and was unable to defend itself. Wan Ahmad bin Sharif explained that KSTBB's solicitor was overseas at that time and had not informed KSTBB of what should be done. LJT in his affidavit affirmed on 2 February 1996 replied that KSTBB's failure to put forward its case before the arbitrator was because KSTBB and/or its solicitor failed to appear in the proceeding before the arbitrator despite having been notified repeatedly by the arbitrator himself. The judge below acknowledged at pp. 24 and 25 of the Appeal Record that he did not take into account at all the negligence of KSTBB's solicitor in deciding whether there were special circumstances to postpone the public auction. As to why KSTBB's counterclaim was not arbitrated. Mr. Faizul in his submission before us, attributed it to KSTBB's refusal or negligence which he said that the judge below did not consider. Mr. Gurbachan did not touch on this point having maintained that the only reason why the counterclaim was not arbitrated, was because the order dated 6 August 1992 did not refer it to arbitration. Guided by the decisions in *Wagner's* case and *Schofield's* case it was relevant and necessary to consider why the counterclaim was not arbitrated in deciding whether or not there were special circumstances under O. 47 r. 1(1)(a). In this connection, we were satisfied from a perusal of the notes of proceedings recorded by the arbitrator in the Appeal Record that from the start KSTBB failed to attend by its own representative or its solicitor at the preliminary hearing on 11 June 1993 fixed by the arbitrator despite having been duly notified. It failed to pay the RM5,000 arbitration deposit; it did not file its defence or counterclaim or its bundle of documents with the arbitrator. It did not say "no" to arbitration and had twice requested for its postponement. The first request was granted but not the second. It was also reminded to pay its share of the arbitration deposit which it did not. It did not attend the arbitration proceeding whatever. Those were mere circumstances which explained why the counterclaim in G.S. No: 22-23-91 was not arbitrated.

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- a* Whether or not KSTBB's counterclaim should be arbitrated together with LJT's claim (a point raised by Mr. Su before the judge below in connection with the order dated 6 August 1992) was eminently a matter for the arbitrator to direct. The initiative was on LJT and KSTBB to submit its points of claim and counterclaim respectively to the arbitrator in compliance with the order
- b* dated 6 August 1992. But by not paying its share of the deposit and not submitting its points of counterclaim, KSTBB virtually precluded and pre-empted any such direction by the arbitrator. The arbitrator proceeded with the arbitration of LJT's claim and at the preliminary hearing on 11 June 1993 directed LJT's points of claim to be submitted by 22 June 1993 and its bundle
- c* of documents by 1 July 1993. He also directed KSTBB to pay its share of deposit and to submit its points of defence and bundle of documents by 30 July 1993 (see Appeal Record p. 45) which KSTBB was bound to comply. However, it did not comply. In the circumstances, LJT's claim was arbitrated in default of KSTBB's defence. No initiative was taken by KSTBB to submit
- d* its counterclaim at any time. There was thus no counterclaim formally before the arbitrator; accordingly, he made no such direction. In the result although KSTBB's counterclaim in G.S. No: 22-23-91 was stayed by the order dated 6 August 1992, it was not arbitrated. From pp. 44 to 45 of the Appeal Record (paras 2.1.13 to 2.1.19), it was plain that both KSTBB and its solicitor knew that the deposit was payable as the first step but none was too keen to abide.
- e* At para. 2.2 pp. 46 to 47 of the Appeal Record, the arbitrator gave his reasons for proceeding *ex parte* as the only available option and he concluded that KSTBB was "genuinely the reluctant party – not willing whatsoever to be a party in the instant arbitration" and if KSTBB was disadvantaged in any way, that was entirely its own doing and it had only itself to blame.
- f* We agreed entirely, with the arbitrator's finding of fact which in our view was well justified and forthright in the circumstances. The reason why KSTBB's counterclaim in G.S. No: 22-23-91 was not arbitrated was due to KSTBB's lack of initiative and poor response due its overall reluctance to have the claim and counterclaim determined expeditiously by the appointed arbitrator
- g* in compliance with the order dated 6 August 1992. In the premises we hold that there were no special circumstances which rendered it inexpedient to enforce the judgment dated 3 June 1994 or the prohibitory order dated 22 August 1994.
- h* In the light of what we said above, the second auction of the land attached under the prohibitory order must be allowed to proceed unless KSTBB satisfied the requirement of O. 47 r. 7(c) of the RHC 1980, a point which the judge below did not address his mind to. Mr. Gurbachan said that the purpose of the second auction was to recover RM422,000 the balance of the judgment
- i* debt exclusive of interest thereon. We were unable to find any definite proposal

by KSTBB in the affidavit of Wan Ahmad bin Sharif affirmed on 12 December 1995 to raise enough money to discharge the balance of the judgment debt plus interest thereon which continued to accrue. There was a general undertaking in para. 14(a) which quite clearly was insufficient to fulfill the specific requirements of O. 47 r. 7(c).

For these grounds stated, we decided to allow the appeal with costs here and below and that the deposit to be refunded to the appellant and we ordered accordingly.

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